

**KATHLEEN WALLMAN  
KATHLEEN WALLMAN, PLLC  
9332 RAMEY LANE  
GREAT FALLS, VA 22066**

October 9, 2008

Marlene Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., S.W.  
Washington, DC 20554

RE: 07-42

Dear Ms. Dortch:

On October 7, 2008, Robert Herring, Sr., CEO and Co-Founder of WealthTV, and Charles Herring, President and Co-Founder of WealthTV met with the following Commission officials in separate meetings:

- Rosemary Harold, Media Adviser to Comm. McDowell.
- Rick Chessen, Senior Legal Adviser to Comm. Copps
- Chairman Martin, Michelle Carey, Senior Legal Adviser, and Monica Desai, Chief of the Media Bureau

I attended the meetings as litigation counsel to WealthTV. In each meeting, Robert Herring and Charles Herring briefed the attendees on the contents of the attached one-page summary of proposed reforms and the extent of support that the proposals enjoy. They urged prompt consideration and adoption of the reforms by the Commission in the simplest possible form. In the meeting with Ms. Harold, Messrs. Herring pointed out that the direction of these reforms is consistent with the statement of Comm. McDowell, also attached. In the meeting with Chairman Martin, Messrs. Herring made a status-only inquiry with respect to WealthTV's pending carriage access complaints and learned that they remain under consideration in accordance with applicable Commission regulations.

Respectfully submitted,

*//signed//*

Kathleen Wallman  
Counsel to WealthTV

## **Changes to FCC Regulation 73.1301 – Carriage Access Complaint Process**

### **1. Establishment of a Shot Clock**

Once a Complaint, Answer, and Reply are filed, there is neither a timeline for when the FCC will respond to the complaint nor when final resolution will take place. Proposed change to Section 76.1302:

#### *(h) Deadlines for Commission Findings and Decisions*

(1) The Commission shall make a determination as to whether a complainant has made out a prima facie case under this section within 30 days of the filing of a complainant's reply to a defendant's answer to a complaint, or the date on which such reply would be due if none is filed.

(2) The Commission shall issue a final order resolving a complaint found to have made out a prima facie case no later than 6 months from the date of the initial filing of the complaint.

### **2. Definition of Prima Facie Case**

Currently, there is no definition in the rules of what constitutes a prima facie case. Consequently, defendants argue their own versions of the standard to try to get independent programmers' complaints dismissed. This lack of clarity is a problem for independent programmers who are in litigation before the Commission, and for programmers who are contemplating litigation to vindicate their rights. Proposed change to Section 76.1302:

- (c) *Contents of Complaint* .... (5) "Prima facie case" means that the complainant shall put before the Commission evidence of the elements of the discrimination offense, supported as appropriate by documents and testimony by declaration or affidavit, that, if subsequently found to be true by a finder of fact, would be sufficient to establish a violation under this section.

### **3. Prohibition against retaliation**

It is important that the Commission make it clear that MVPD discrimination in the form of retaliation against independent programmers for their lawful assertion of their rights will not be tolerated, whether before, during or after carriage. Proposed change to Section 76.1301:

- (c) *Discrimination*. [Add the following at the end of subsection c] A multichannel video programming distributor's refusal to deal, or refusal to negotiate in good faith, with a non-affiliated video programming provider because of the latter's assertion of rights or remedies under this Subpart shall constitute discrimination.

### **4. Stay During Litigation**

Independent programmers who have carriage and are offering their programming to cable or DBS subscribers may suffer discrimination in the terms or conditions of carriage. For example, after the network has made substantial investments and commitments in programming, and entered into advertising and other arrangements, the MVPD may seek to favor affiliated programming by "re-tiering" the independent programmer to an expensive or unpopular tier with reduced viewership and revenue during or after an initial term of the carriage agreement. Proposed change to Section 76.1302:

Insert before existing subsection (g) and renumber accordingly:

- (g) *Stay during litigation*: Upon a complainant's filing of a complaint alleging discrimination with respect to a change in the terms or conditions of carriage, any such change shall be null and void and the terms and conditions of carriage shall revert to *status quo ante* for the duration of the pendency of the Commission's decision upon such complaint.

**STATEMENT OF  
COMMISSIONER ROBERT M. MCDOWELL**

Re: *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor to Comcast Corporation, Transferee, Memorandum Opinion and Order (MB Docket No. 05-192).*

I support the Commission's decision to approve this transaction. Clearly, the merger will benefit consumers, particularly those who continue to be served by Adelphia during its lengthy bankruptcy proceeding, by creating synergies that will spur investment, create efficiencies and speed the roll-out of competitive new technologies.

However, it has become clear to me through this merger review process that the Commission's regulations governing program carriage agreements and program access by MVPDs for years have not been enforced in the expeditious manner contemplated by Congress and our own rules. Although the substance of these regulations provides MVPDs and programmers with standards and processes for redress of their program access and program carriage disputes with cable providers, very few parties have filed complaints to adjudicate their disputes. Those that are filed often wait too long for resolution. In fact, it seems that many disputes are never resolved. Why? Because the FCC has not been doing its job. The parties to these complaints deserve better treatment from this Commission. More importantly, so do consumers. Competition, in this quickly evolving market, should not be held back by an indolent bureaucracy's failure to obey simple Congressional mandates. Speedy resolution of disputes is critical, especially where regional sports networks are concerned. When a programmer or an MVPD is unable to air games at the start of a season, the competitive damage to its business has already been done. The FCC's inaction should not be responsible for such a delay. Accordingly, I strongly support the commitment by the Commission to review and reform the procedures for enforcement of its program access and program carriage rules. And I applaud the commitment to do so in short order.

In the meantime, part of what the Commission is doing today is to pave a path toward a private sector solution to resolve program access disputes. Of course, our preference is that conflicts be resolved and deals be made without parties having to resort to litigation or arbitration. This Order provides incentives for such resolutions. However, should parties refuse to negotiate or fail to agree, we are paving a path toward private sector binding arbitration, with the ultimate destination being final resolution. With a two-step analysis commencing with a determination of whether carriage should be required at all, followed by baseball-style arbitration to determine rates, terms and conditions, no particular outcome is guaranteed. Furthermore, no new legal standards are being created. However, to ensure speedy resolution, we are imposing a "shot clock" on all proceedings, including any relevant Commission review of arbitration decisions. Again, arbitration can be avoided if parties make deals. But, should arbitration be necessary, it will be concluded swiftly and at minimal cost. This dispute resolution framework is used successfully thousands of times per day throughout the country in the private sector, and we are confident that it will be just as successful in this context as well. We believe all parties will benefit, especially the American consumer.

For similar reasons, I also wholeheartedly support binding arbitration of the dispute between the Mid-Atlantic Sports Network and Comcast over carriage of the Washington Nationals games. Protracted negotiations and legal wrangling between the parties somehow have failed to produce televised coverage of 75 percent of this season's games for the 1.3 million Comcast subscribers in the Washington D.C. market. And, apparently, the MASN complaint has been left to rot in some lost crypt inside this building. Accordingly, the narrow arbitration remedy in the Order creates a private-sector solution to the dispute. This remedy also does not dictate a particular outcome, nor does it create a new legal standard for

reviewing program carriage issues. It does, however, provide for a timely and long-overdue decision that will break the long-standing impasse between MASN and Comcast. One way or the other, a decision will be made. Of course, the parties are free to resolve the dispute beforehand, at any time.

I would like to thank my fellow Commissioners for their hard work on this important matter. The lights have been burning late here at the FCC recently. Many thanks to Commissioner Tate for her insight – especially regarding children’s programming. Thank you, Commissioner Adelstein, for your efforts regarding program access and carriage. Commissioner Copps, many thanks for initiating the conversation on net neutrality. I appreciate your thoughtfulness and look forward to additional dialogue. And lastly, Mr. Chairman, thank you for your leadership, especially working so hard into the wee hours.

I thank Donna Gregg and the Media Bureau staff for their dedication and hard work on this item. I look forward to our review and reform of our rules.